Supreme Court, U.S.
FILED
DEC 20
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-68

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

EDDIE S. YLST, WARDEN,

Petitioner,

-vs-

OWEN DUANE NUNNEMAKER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, ALASKA, CONNECTICUT, FLORIDA, IDAHO, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, UTAH, VIRGINIA AND WASHINGTON IN SUPPORT OF PETITIONER, AMICI CURIAE

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Questions Presented

Has the United States Court of Appeals for the Ninth Circuit misconstrued and missapplied the "plain statement" rule adopted by this Court in Harris v. Reed?

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INTRODUCTION

In the decision below, the United States Court of Appeals for the Ninth Circuit reversed the district court's finding that respondent's Fifth and Sixth Amendment challenges to the prosecution's psychiatric testimony was procedurally barred because the California Supreme Court, in summarily denying respondent's second "original" state petition for writ of habeas corpus, did not "clearly and expressly" state that it was doing so in reliance upon respondent's "procedural default." Nunnemaker v. Ylst, 904 F.2d 473, 476 (9th Cir. 1990). The "procedural default" averred to by the Ninth Circuit was the express finding of the California Court of Appeal, on direct appeal, that the claims were precluded due to respondent's failure to object at trial and the California Supreme Court's denial to review the direct appeal. See Nunnemaker v. Ylst, 904 F.2d at 474.

The Ninth Circuit's decision evidences a profound misunderstanding of this Court's holding in Harris v. Reed, 489 U.S. 255, 109 S. Ct. 1038 (1989), and state court procedural default in general. Further, the decision flies in the face of the principles of federalism and comity underlying the exhaustion and procedural default doctrines. Finally, if permitted to stand, the Ninth Circuit's decision will encourage state prisoners to frustrate and circumvent established state court procedures in presenting their federal constitutional claims to the state courts and will result in a concomitant avalanche of heretofore unexhausted or procedurally barred claims upon the already overburdened United States District Courts.

Accordingly, amici urge this court to seize the opportunity to clearly articulate application of the "plain statement" rule in the context of state court procedural defaults.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS MISCONSTRUED THIS COURT'S HOLDING IN HARRIS v. REED.

A. The "plain statement" rule adopted by this Court in Harris v. Reed, applies only when the state prisoner has fairly presented a claim to the state courts in a procedurally appropriate manner, resulting in an ambiguous ruling by the last state court rendering judgment and providing reasons for the judgment.

In Harris v. Reed this Court held that, when the last state court rendering judgment on a particular claim makes mention of a procedural bar (i.e. waiver, preclusion) but alternatively addresses the merits of the federal claim, there is no procedural bar to a federal court's subsequent consideration of the claim in a habeas corpus proceeding unless the state court clearly expresses its reliance upon the procedural bar as an independent basis for its ruling. 489 U.S. at ___, 109 S. Ct. at 1043-44. The Ninth Circuit, however, reads Harris v. Reed, to hold that

federal courts are to wear blinders in determining whether a particular claim is procedurally barred, looking only to the last state court order addressed to the claim. This is clearly not what this Court intended.

In determining whether federal constitutional claims have been exhausted in state court, federal courts must necessarily look to the appellate and post-conviction procedures available and utilized in state court. See Teague v. Lane, 489 U.S. ___, ___, 109 S. Ct. 1060, 1067-68 (1989); Castille v. Peoples, 489 U.S. 346, ___, 109 S. Ct. 1056, 1058-60 (1989). In Castille v. Peoples, decided the same day as Harris v. Reed, the state prisoner filed a post-appeal "petition for allocatur" raising certain federal constitutional claims. 489 U.S. at ___, 109 S. Ct. at 1058. This Court noted that, under Pennsylvania law, "allocatur" review "is not a matter of right, but of sound

judicial discretion." Id. The Court held that the Pennsylvania Supreme Court's denial of the petition without comment was not an on-the-merits denial of the claims because the state prisoner had not "fairly presented" the claims to the state's highest court in a procedurally appropriate manner. 489 U.S. at ___, 109 S. Ct. at 1060. Accordingly, the Court reversed the circuit court of appeals' decision that had found the claims properly exhausted, stating, for purposes of remand, that "[t]he requisite exhaustion may nonetheless exist, of course, if it is clear that respondent's claims are now procedurally barred under Pennsylvania law." 489 U.S. at ___, 109 S. Ct. at 1060, citing Engle v. Isaac, 456 U.S. 107, 125-26 n.28 (1982); Teague v. Lane, 489 U.S. 288, ___, 109 S. Ct. 1060, 1068 (1989).

Thus, as a prerequisite to application of the "plain statement" rule, the federal court must determine that the claim was

fairly presented to the state courts in a procedurally appropriate manner. A state prisoner is not free to pick and choose which procedural vehicle he wishes to utilize in presenting his federal constitutional claims to the state's highest court -- he must utilize those procedures mandated by state law. See Castille v. Peoples, 489 U.S. at ___, 109 S. Ct. at 1059-60. If a state prisoner has utilized an inappropriate procedural vehicle in attempting to present the claim to the state courts, an order denying the claim -- even if issued by the state's highest court -- will not be construed as an on-the-merits denial. Castille v. Peoples, 489 U.S. at ___, 109 S. Ct. at 1060. Raising the claim in such a fashion is simply not a "fair presentation" of the claim, and the federal courts should not presume that state courts refuse to follow their own procedural rules unless the state court expressly so states. See Castille v.

Peoples, 489 U.S. at ___, 109 S. Ct. at 1060. Principles of federalism and comity demand no less.

In the present case, the Ninth Circuit held that the filing of an "original" petition for writ of habeas corpus in the California Supreme Court was a procedurally appropriate manner of presenting federal constitutional claims to the state supreme court under California law.[1] See Nunnemaker v. Ylst, 904 F.2d at 476 n.4.

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1. A state "petition for writ of habeas corpus" might not be a procedurally appropriate manner of presenting federal constitutional claims to the state's highest court in other states. For example, in Arizona, a state prisoner may seek review of federal constitutional claims only by way of direct appeal or petition for post-conviction relief. See Rules 31, 32, Ariz. R. Crim. P.; State v. Sandon, 161 Ariz. 157, 158, 777 P.2d 220, 221 (1989). Under Arizona law, the scope of state habeas corpus is limited to challenging the jurisdiction of the trial court. See State v. Montez, 102 Ariz. 444, 447, 432 P.2d 456, 459 (1967); State v. Morales, 90 Ariz. 11, 12, 363 P.2d 606, 606 (1961).

Petitioner takes issue with this finding, at least when a particular claim has previously been found to be procedurally barred. (See Petition for Writ of Certiorari at 31-34.) The briefing of this state law issue is best left to petitioner. Amici find most troublesome the Ninth Circuit's fixation upon the last state court "order" in applying the "plain statement" rule of Harris v. Reed. As previously noted, such a narrow view of state court procedures is not mandated by this Court's decision in Harris v. Reed and is contrary to the Court's express holding in Castille v. Peoples.

In adopting the "plain statement" rule previously enunciated in Michigan v. Long, 463 U.S. 1032 (1983), this Court made it clear that it was doing so to "avoid the difficulties associated with" ambiguities in state court decisions. Harris v. Reed, 489 U.S. at ___, 109 S. Ct. at 1042. In the decision below, the Ninth Circuit has

contorted the "plain statement" rule to create an ambiguity where none existed. The Fourth, Fifth, and Eleventh Circuits have been presented with a similar procedural scenario, but through exertion of intellectual vigor woefully lacking in the Ninth Circuit's decision, reached contrary and proper results. See Felton v. Barnett, 912 F.2d 92, 94-96 (4th Cir. 1990); Harmon v. Barton, 894 F.2d 1268, 1271-74 (11th Cir. 1990); Russell v. Lynaugh, 892 F.2d 1205, 1210-11 (5th Cir. 1989).

In Felton v. Barnett, the state prisoner, in his fifteenth state motion collaterally attacking his conviction, for the first time raised a claim of racial discrimination in the selection of the foreperson of the grand jury that indicted him. 912 F.2d at 93. The superior court denied the motion, finding the claim barred due to the state prisoner's failure

to raise this claim in his prior state court actions. Id. at 93-94.

The North Carolina Supreme Court denied the state prisoner's petition for writ of certiorari, stating:

> Upon consideration of the petition filed by Defendant in this matter for a writ of certiorari to review the Superior Court, Durham County, the following order was entered and is hereby certified to the Superior Court of that county:
>
> Denied by order of the Court in conference, this 30th day of June 1988.

Id. at 94. In finding the state prisoner's claim procedurally barred for purposes of federal habeas corpus review, the Fourth Circuit held that the North Carolina Supreme Court's denial of certiorari was not "the last state court judgment in the case" because it merely refused to hear the state prisoner's appeal from the superior court's denial of the motion on procedural grounds. Id. The Fourth Circuit did not fixate upon the last state court "order," but noted

that, under North Carolina law and procedure, it was clear that the superior court's denial of the state prisoner's motion was the relevant "judgment," and that it "clearly and expressly" rested upon a state procedural bar. Id. at 95.

In Russell v. Lynaugh, the Texas Court of Criminal Appeals, on direct appeal, ruled that the state prisoner had waived his Witherspoon[2] claim, in relation to the excusal of three particular veniremen, by his failure to raise appropriate objections at trial. 892 F.2d at 1209. The state prisoner subsequently filed a state petition for writ of habeas corpus in the trial court, raising a Witherspoon claim in relation to the excusal of a fourth venireman. Id. The trial court, citing the court of appeals' previous decision, denied the

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2. Witherspoon v. Illinois, 391 U.S. 510 (1968).

petition, and the state prisoner appealed to the court of appeals which in an unwritten order denied the writ. Id. In light of this procedural posture, the Fifth Circuit applied the "plain statement" rule of Harris v. Reed. The court first noted that it was "absolutely clear" that the Texas Court of Criminal Appeals had applied a state procedural bar in rejecting the state prisoner's Witherspoon claims on direct appeal. Id. at 1210. The court next stated that there was "no reason for distinguishing" the claim raised on appeal from that raised in the state petition for writ of habeas corpus, since the Witherspoon issue was identical. Id. Finally, the Fifth Circuit rejected the state prisoner's argument that the "last state court rendering judgment" did not "clearly and expressly" apply a procedural bar when the Texas Court of

Criminal Appeals denied the petition for writ of habeas corpus in an unwritten order:

> [T]he simple denial of the petitioner's rerun of identical claims on habeas [is no] basis to ignore the clear and express rulings of the Texas appellate court. Indeed, we unhesitatingly read this disposition of the habeas claims as a clear and express reliance upon the earlier, fully articulated rulings applying the procedural bar to all Witherspoon claims. Moreover, when we apply the literal words of Harris, we can only conclude that, true to the command of these words, "the last state court rendering a judgment in the case," that is the Texas Court of Criminal Appeals, "clearly and expressly stated that judgment rests upon a state procedural bar," Harris, 109 S.Ct. at 1043, when it ruled on the Witherspoon issue. The "plain statement" rule does not require that the state court regurgitate the words of its earlier clear and express rulings every time identical issues are resubmitted to that court in the same case. All that is required is that "the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case," Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985), and here actual reliance was expressed on three occasions in the state

> court's last opinion on the subject. Consequently it could not be plainer to us.

Id. at 1210-11 (emphasis added). The Fifth Circuit went on to note that a refusal to recognize a state court procedural bar would amount to a slap in the face to the long recognized and respected principles of federalism and comity, governing federal-state relations:

> Respect for the independence of state courts has been one of the primary cornerstones for the refusal of federal courts to decide cases where there is an adequate and independent state ground. Michigan v. Long, 103 S.Ct. at 3476. We do not know how the Texas Court of Criminal Appeals could have been clearer in asserting an independent state ground as a basis for rejecting the Witherspoon claims in this case. To ignore this emphatically stated basis for the state court's rulings, stated on three occasions in its opinion, would certainly exhibit disrespect for the judgment of the state court, and its right, as an independent judiciary, to apply its own constitutionally proper laws in deciding its own cases.

Id. at 1211 (emphasis added).

In Harmon v. Barton, the Florida trial court dismissed the state prisoner's second state motion for post-conviction relief, finding that the claim that his guilty plea was involuntary was procedurally barred because he had failed to raise the claim on direct appeal or in his prior post-conviction relief motion. 894 F.2d at 1269. The state appellate court, without comment, affirmed the trial court's denial of post-conviction relief. Id. at 1269-70. In denying the state prisoner's petition for writ of habeas corpus, the district court found the claim procedurally barred due to the state prisoner's failure to raise the claim on direct appeal. Id. at 1270. Observing the time honored principles of federalism and comity, the Eleventh Circuit looked to applicable state court appellate and post-conviction relief procedures, noting that, under Florida law, a motion for post-conviction relief

cannot be utilized to raise issues that were either raised or could have been raised on direct appeal and that issues not raised in a motion for post-conviction relief were procedurally barred in a second motion. Id. at 1270-71. The court also noted that, under Florida law, an unwritten per curiam affirmance of a trial court's denial of post-conviction relief on the ground of procedural default was an affirmance of "not only the judgment but the reasoning of the trial court." Id. at 1272-73. The Eleventh Circuit aptly stated:

> The "plain statement" rule, it should be emphasized, applies only when an ambiguity exists in the state court disposition. A per curiam affirmance decision does not create ambiguity to an otherwise unambiguous situation, just as it does not clarify ambiguity that exists based on the decision below. Stated differently, the plain statement rule should not be applied to create an ambiguity where one did not exist simply because the appellate court, by its per curiam

> affirmance, elected not to restate an unambiguous lower court ruling. We conclude that the court's per curiam affirmance of the trial court's ruling explicitly based on procedural default is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts.

Id., 894 F.2d at 1273 (emphasis added; citation and quotation omitted). The court refused to take an untenable and narrow view of the "last state court order," stating:

> Unlike the state appellate court in Harris and other cases involving the Long plain statement, the state appellate court in this case did not issue a written opinion in which it made an ambiguous reference to state procedural bar while relying on federal law for its decision. The court's per curiam affirmance without comment of the lower court's ruling which expressly relied on procedural default does not require this court to speculate on what basis the state court denied petitioner's claim. The rationale behind the Court's decision in Harris - which is to relieve federal courts "from having to determine whether in a given case, consistent with state law, the state court has chosen to forgive a procedural default" - is

> equally applicable here. 109 S.Ct. at 1044 n.11. Under these circumstances, the policy considerations discussed in Harris are not compromised by applying the plain statement rule to the last state court that rendered judgment and provided reasons for the judgment.

Id. (emphasis added; footnote omitted).

In its decision below, the Ninth Circuit stated that its narrow view of the "last state court order" was effectively mandated by footnote 12 of this Court's decision in Harris v. Reed. Nunnemaker v. Ylst, 904 F.2d at 476. The Eleventh Circuit, however, noted that this Court did not intend such an untenable reading:

> We believe that the advice in Harris to state courts on stating their reliance on procedural grounds in form orders, 109 S.Ct. at 1044 n.12, was addressed to this situation where the lower court simply denies the habeas petition without comment.

Harmon v. Barton, 894 F.2d at 1274 (emphasis added). Any other reading would amount to an arrogant dictation of

how states must tailor their state court procedures to suit the whims of federal courts on collateral review -- a result never envisioned in the jurisprudence of this Court. See e.g. Castille v. Peoples, 489 U.S. at ___, 109 S. Ct. at 1059; Engle v. Issac, 456 U.S. 107, 128-29 (1982); Rose v. Lundy, 455 U.S. 509, 515-19 (1982). Further, it cannot be expected that state courts are aware of the intricacies of federal habeas corpus review -- they simply follow their established procedural rules. In looking over the shoulders of the state courts on collateral review, it is the duty of the federal judiciary, in observance of the principles of federalism and comity, to defer to the state's procedural rules and not to presume that the state courts have not followed their own rules unless the state court has expressly so stated.

Therefore, a reasoned interpretation of Harris v. Reed, as well as the remainder of this Court's habeas corpus jurisprudence, leads to the rational conclusion that the "plain statement" rule applies only when the state prisoner has fairly presented his claim to the state courts in a procedurally appropriate manner and the ruling of the last state court providing reasons for its judgment is ambiguous on whether the state court invoked a procedural bar as an independent basis for its judgment. By fixating upon the last state court "order," and refusing to consider the procedural posture of the state court proceeding, the Ninth Circuit clearly erred in applying the "plain statement" rule to lift a previously imposed state court procedural bar and to create an "ambiguity" where none existed. The decision of the Ninth Circuit must be reversed.

B. When a state court has applied a procedural bar, a subsequent state court ruling denying the claim does not vitiate the procedural bar unless the state court expressly so states.

Perhaps the most disturbing aspect of the lower court's decision is its unreasoned conclusion that the summary denial of the respondent's second "original" state petition for writ of habeas corpus somehow vitiated the express procedural bar applied nearly 10 years prior. As previously noted, when a state court applies a procedural bar, subsequent state court rulings denying the claim do not operate to lift, or vitiate, the procedural bar. Felton v. Barnett, 912 F.2d at 94-96; Harmon v. Barton, 894 F.2d at 1273-74; Russell v. Lynaugh, 892 F.2d at 1210-11. It simply makes no sense to encourage state prisoners to continuously paper the state courts with repetitive petitions or motions in the hope that a state court

will simply "deny" the pleading without using the magic words "for reasons of procedural default." Clearly, this Court did not intend such a bizarre and unreasoned result. Again, the "plain statement" rule was adopted to avoid or resolve ambiguities associated with state court decisions -- not to create them. See Harris v. Reed, 489 U.S. at ___, 109 S. Ct. at 1042. Indeed, amici submit that the "plain statement" rule should be applied in favor of the continued existence of a previously imposed procedural bar unless a state court, in a subsequent decision, "clearly and expressly" lifts the bar and does not rely upon the bar as an independent basis for its ruling. Such a rule would bode well for federal-state relations and is a logical application of Harris v. Reed to avoid creating ambiguities in state court decisions.

The court below clearly erred in holding that the "plain statement" rule of Harris v. Reed mandated that the 10-year-old procedural bar previously imposed was vitiated by the California Supreme Court's mere denial of a state petition for writ of habeas corpus that included the barred claim. In so holding, the Ninth Circuit arrogantly presumed that the California Supreme Court failed to follow its own procedural rules, and exhibited a total disregard for the principles of federalism and comity underlying the exhaustion and procedural default doctrines. The decision must be reversed.

CONCLUSION

The United States Court of Appeals for the Ninth Circuit has misconstrued this Court's holding in Harris v. Reed in a way that will encourage state prisoners to frustrate and circumvent state court procedures and wreak havoc upon the

already over burdened United States District Courts. This Court should seize the opportunity to clearly articulate application of the "plain statement" rule in the context of state court procedural defaults. In so doing, the Court must necessarily reverse that portion of the Ninth Circuit's decision remanding the case to the district court for consideration of the merits of respondent's Fifth and Sixth Amendment claims.

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CRM90-1334/5601D/ch